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Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance Issued: April 2, 2015

AAPD 15-01

PROHIBITION ON FEDERAL CONTRACTING WITH AND PROVIDING FEDERAL ASSISTANCE TO ENTITIES THAT REQUIRE CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS

Subject Category: Assistance and Acquisition Management
Type: POLICY

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are EFFECTIVE AS OF THE ISSUED DATE unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: ☒ Is New ☐ Replaces/ ☐ Amends CIB/AAPD

Applicable to: ☒ Existing awards; ☒ Modification required

☐ No later than

☒ As noted in guidance below*

☒ RFPs/RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e., 8(a), sole source, IQC

☐ Other

Precedes change to:

☐ AIDAR Part(s) Appendix

☒ USAID Automated Directives System (ADS) Chapter – ADS 303 and ADS 308

☐ Code of Federal Regulations

☒ Federal Acquisition Regulations

☐ No change to regulations

☒ New Provision/Clause Provided Herein: If checked, scheduled update to GLAAS:

/s/

Aman S. Djahanbani

1. PURPOSE:

This Acquisition & Assistance Policy Directive (AAPD):

- A. Advises Contracting Officers (COs) and Agreement Officers (AOs) that there is a statutory prohibition in Section 743 of Division E, Title VII of Pub.L.113-235 against providing Federal funds to an *“entity that requires employees or subcontractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.”*
- B. Informs COs that there is a FAR rule in process, which will implement this Section 743 prohibition. However, pending the publication of that FAR rule, a FAR class deviation M/OAA-DEV-FAR-15-01c has been approved by the M/OAA/Director, which authorizes M/OAA to immediately begin implementing this statutory prohibition. The Chair of the Civilian Agency Acquisition Council (CAAC) has provided agencies with a related FAR representation and clause, which are attached to this AAPD, and which must be used now, pending issuance of the new FAR rule.
- C. Informs AOs that the M/OAA Director has approved the attached representation and mandatory standard provision for Assistance solicitations and awards, to immediately implement this statutory prohibition

2. REQUIRED ACTIONS

(a) **FAR Representation 52.203-98**

- Effective immediately, COs must include the attached FAR representation 52.203-98 in all **solicitations**, including solicitations for the acquisition of commercial items under FAR part 12 and simplified acquisitions.

(b) **FAR Clause 52.203-99**

- Effective immediately, COs must include the attached FAR clause 52.203-99 in all **solicitations and contracts**, including solicitations and contracts for the acquisition of commercial items under FAR part 12, or **when obligating funds on existing contracts** through a bilateral modification.

(c) **Mandatory Representation**

- Effective immediately, AOs must include the attached mandatory representation in all **solicitations**.

(d) **Mandatory Provision**

- Effective immediately, AOs must include the attached Mandatory Provision in all **solicitations and awards to non-federal entities** (U.S. and Non-US NGOs and PIOs). The Mandatory Standard Provision must also be included in existing awards through a bilateral amendment **when obligating funds on existing awards**.

4. **DURATION of AAPD:** This AAPD is effective immediately. The FAR representation and clause remain in effect until such time as the pending FAR rule has been issued. The Assistance representation and mandatory provision remain in effect until they are incorporated into the relevant Standard Provisions in ADS 303 and ADS 308.

5. **POINT OF CONTACT:**

USAID Contracting and Agreement Officers may direct their questions about this AAPD to Rosella Marshall, M/OAA/P, at (202) 567-4675 or email: romarshall@usaid.gov.

Attachment 1 – For Acquisition:

FAR Provision 52.203-98, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreement ---Representation (Deviation M/OAA-DEV-FAR-15-01c); and FAR Clause 52.203-99, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements (Deviation M/OAA-DEV-FAR-15-01c)

Attachment 2 – For Assistance:

Prohibition on Providing Federal Assistance To Entities that Require Certain Internal Confidentiality Agreements (Representation)–
-- Prohibition on Providing Federal Assistance To Entities that Require Certain Internal Confidentiality Agreements (Provision)

Attachment 1 – For Acquisition

52.203-98, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements-Representation (DEVIATION 2015-02)

Insert the following provision in all solicitations that will use Federal funds, including solicitations for the acquisition of commercial items under FAR part 12 and simplified acquisitions.

PROHIBITION ON CONTRACTING WITH ENTITIES THAT REQUIRE CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS-REPRESENTATION (APR 2015)

(a) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Resolution Appropriations Act, 2015 (Pub. L. 113-235), Government agencies are not permitted to use funds appropriated (or otherwise made available) under that or any other Act for contracts with an entity that requires employees or subcontractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The prohibition in paragraph (a) of this provision does not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(c) *Representation.* By submission of its offer, the Offeror represents that it does not require employees or subcontractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(End of provision)

52.203-99, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements (DEVIATION 2015-02)

Insert the following clause in all solicitations and contracts that will use Federal funds, including solicitations and contracts for the acquisition of commercial items under FAR part 12 and simplified acquisitions, or when obligating Federal funds on existing contracts.

PROHIBITION ON CONTRACTING WITH ENTITIES THAT REQUIRE CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS (APR 2015)

(a) The Contractor shall not require employees or subcontractors seeking to report fraud, waste, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The contractor shall notify employees that the prohibitions and restrictions of any internal confidentiality agreements covered by this clause are no longer in effect.

(c) The prohibition in paragraph (a) of this clause does not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(d)(1) In accordance with section 743 of Division E, Title VI I, of the Consolidated and Further Continuing Resolution Appropriations Act, 2015 (Pub. L. 113-235), use of funds appropriated (or otherwise made available) under that or any other Act may be prohibited, if the Government determines that the Contractor is not in compliance with the provisions of this clause.

(2) The Government may seek any available remedies in the event the contractor fails to comply with the provisions of this clause.

(End of clause)

Attachment 2 – For Assistance

Until such time as this Representation is incorporated into ADS 303 and ADS 308, AOs must include this Representation must be incorporated as Standard Provision No. 4 in Part V – Standard Provisions for Solicitations found in ADS 303mav - Certifications, Assurances Other Statements of Recipient and Solicitation Standard Provisions.

4. Prohibition on Providing Federal Assistance to Entities that Require Certain Internal Confidentiality Agreements-Representation

Insert the following pre-award provision into Section IV of all assistance solicitations.

4. PROHIBITION ON PROVIDING FEDERAL ASSISTANCE TO ENTITIES THAT REQUIRE CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS - REPRESENTATION (APRIL2015)

(a) In accordance with section 743 of Division E, Title VII, of the Consolidated and further Continuing Resolution Appropriations Act, 2015 (Pub. L. 113-235), Government agencies are not permitted to use funds appropriated (or otherwise made available) under that or any other Act for providing federal assistance to an entity that requires employees, subawardees or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees, subawardees, or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The prohibition in paragraph (a) of this provision does not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(c) By submission of its application, the prospective recipient represents that it does not require employees, subawardees, or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees, subawardees, or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(End of provision)

Until such time as this Mandatory Standard Provision is incorporated into ADS 303 and ADS 308, AOs must include this provision in awards to U.S. NGOs, Non-US NGOs, PIOs, and Fixed Amount Awards, as part of the Mandatory Standard Provision.

M.XX - Prohibition on Providing Federal Assistance to Entities that Require Certain Internal Confidentiality Agreements

Insert the following mandatory standard provision in all assistance solicitations and assistance awards that will use Federal funds, or when obligating Federal funds on existing assistance awards.

PROHIBITION ON PROVIDING FEDERAL ASSISTANCE TO ENTITIES THAT REQUIRE CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS (APRIL 2015)

- (a) The recipient must not require employees, subawardees, or contractors seeking to report fraud, waste, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees, subawardees, or contractor from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.
- (b) The recipient must notify employees that the prohibitions and restrictions of any internal confidentiality agreements covered by this provision are no longer in effect.
- (c) The prohibition in paragraph (a) of this clause does not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information.
- (d) (1) In accordance with section 743 of Division E, Title VI I, of the Consolidated and Further Continuing Resolution Appropriations Act, 2015 (Pub. L. 113-235), use of funds appropriated (or otherwise made available) under that or any other Act may be prohibited, if the Government determines that the recipient is not in compliance with the requirements of this provision.
- (2) The Government may seek any available remedies in the event the recipient fails to comply with the requirements of this provision.

(End of clause)